Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DESIREE CHRYSLER, et al,
Petitioners,

v.

COTTER CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When the District Court applies the doctrine of collateral estoppel to consolidated cases it is handling, is the proper standard for appellate review "de novo" as held by the Tenth Circuit or "abuse of discretion" under this Court's Parklane holding?

PARTIES TO THE PROCEEDING

Petitioners

DESIREE CHRYSLER; DANIEL CHRYSLER; AUGUST CHRYSLER, and CLAYTON CHRYSLER, minors, by and through their parents and next friends, Desiree Chrysler and Daniel Chrysler; NORMAN PLATT, individually and as personal representative of the Estate of Dorothy Platt; BRUCE HADLEY; VIRGINIA HADLEY; SHAYLEE HADLEY; KIM MYERS; SID MYERS; CASEY MYERS and CHAD MYERS, minors, by and through their parents and next friends, Kim Myers and Sid Myers.

Respondent

COTTER CORPORATION.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit that gives rise to this petition is reported as Dodge v. Cotter Corp., 203 F.3d 1190 (10th Cir. 2000). A copy of the Opinion is included in the Appendix at Appendix A at 1a-28a. The United States District Court for the District of Colorado ordered entry of final judgment on March 11, 1999, which is included in Appendix B at 29a-34a. The United States Court of Appeals for the Tenth Circuit issued an order denying the Petitions for Rehearing and Suggestions for Rehearing En Banc on March 22, 2000, which is included in Appendix C at 35a-37a.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its Opinion on February 11, 2000. On February 25, 2000, both Petitioners and Respondent filed Petitions for Rehearing and Suggestions for Rehearing En Banc, which the Tenth Circuit denied on March 22, 2000. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF CASE

On February 11, 2000, the Tenth Circuit issued its Opinion in this environmental contamination case, reversing the Honorable Zita Weinshienk's application of the doctrine of collateral estoppel to preclude relitigation of one issue, Defendant Cotter Corporation's ("Cotter") negligent operation of its uranium mill. The trial court held that the same issue was previously litigated before the same Court in a two-month trial of 8 bellwether cases (out of over 500 consolidated

cases), based on the same operative facts. The Tenth Circuit reversed the District Judge, and based thereon overturned the jury verdicts in 14 cases that were tried in a six-week trial (14 of a consolidated group of 55 remaining on the docket), previously confirmed by Judge Weinshienk.[1] App. A at 28a; App. B at 29a-34a.

The Tenth Circuit made a "de novo" review of the factual determination made by the trial judge presiding over both groups of cases, stating that this was the standard for claims barred under the doctrine of collateral estoppel. App. A at 17a. It held that since the trial court's determination of the factual issue was not "unassailable," (App. A at 20a) and since there was no specific "agreement" by Defendant memorialized on the record to be bound by the first jury's finding of negligence in the "test trials" (App. A at 24a), use of collateral estoppel in the succeeding trials was error.

ARGUMENT FOR GRANTING THE WRIT

Henry James explained many years ago that all craft and art derives considerable benefit from the exercise of constraint by those reviewing it: "If we pretend to respect the artist at all, we must allow him his freedom of choice, in the face, in particular cases, of innumerable presumptions that the choice will not fructify." Henry James, "The Art of Fiction", in Partial Portraits 395 (University of Michigan Press 1970) (1888). William Shakespeare warned with some candor that

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[1] The District Court had jurisdiction over the original action pursuant to 28 U.S.C. § 1331 and the doctrines of ancillary and pendent jurisdiction. The case presented a federal question arising under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601, et seq.

discretion has little to recommend it when we limit the choices available by substituting our own views from a distance: "There's small choice in rotten apples." William Shakespeare, The Taming of the Shrew, act 1, sc. i, l. 132-133 (Alfred Harbage ed., Viking Penguin Inc. 1977).

Members of this Court have made similar observations in a variety of contexts. For example, Chief Justice Rehnquist has written:

> It is the district judges rather than appellate judges like ourselves who have had the most experience in managing cases in which an official's intent is an element. Given the wide variety of civil rights and "constitutional tort" claims that trial judges confront, broad discretion in the management of the factfinding process may be more useful and equitable to all the parties than the categorical rule imposed by the Court of Appeals.

Crawford-El v. Britton, 523 U.S. 574, 600-601 (1998).[2]

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[2] Justice Breyer has also written:

> The court of appeals must apply an abuse-of-discretion standard when it reviews the trial court's decision to admit or exclude expert testimony. That standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion.

Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 138-139 (1999)(citation omitted).

The holding and reasoning of the Tenth Circuit in this case is inconsistent with the "abuse of discretion," or "clearly erroneous" standard applied by other Federal Circuits and required by this Court in Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979). Instead the Tenth Circuit establishes a "de novo" and "unassailable" standard of review for factual findings necessary to the application of collateral estoppel that substitutes the work of the appellate panel for that of the District Judge handling the fact issues. The Tenth Circuit ruling also adds a new legal requirement that defendant must agree before an issue, once litigated before the same District Judge, may be precluded against the same defendant. This is also inconsistent with the approach of other Federal Circuits and the offensive use of collateral estoppel for consistent case management approved by this Court in Parklane.

This Court has recognized that the doctrine of collateral estoppel is an important tool in maintaining cost efficiency for both the Court system and the litigants. The

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And Justice Rehnquist criticized the appellate court's absence of deference to the trial judge when the standard of review is abuse of discretion in these words:

> This is a classic instance in which the trial judge, based on his own observation of the interchange, is best able to determine whether the venireman could properly discharge his duties as a juror.... I find no support in our case law for the utter absence of deference paid to the trial court's judgment in this case.

Texas v. Mead, 465 U.S. 1041, 1048 (1984).

system is becoming increasingly expensive, almost prohibitively so, for both the taxpayers and the parties. The public views the Courts as in crisis because of backlogs, delays and inordinate costs of litigation. Committing factual determinations and the scope of their application to the broad discretion of the trial judge is one method this Court has endorsed in managing the work of the Courts in an orderly fashion, and in making justice more accessible to the public.

In Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979), the leading case on federal "offensive non mutual" collateral estoppel, this Court set the standard for review of the trial court's application of the doctrine, namely that the trial judge is given broad discretion. "We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied." Parklane at 331 (emphasis added).

In other cases, the Supreme Court has reversed lower courts that refuse to apply collateral estoppel or give the doctrine such restrictions that in practice it has no vitality. For example, in Ashe v. Swenson, 397 U.S. 436 (1970), a criminal case decided before Parklane, this Court stated that collateral estoppel applies with the same force in criminal as in civil cases. The Court reversed the trial court's refusal to apply collateral estoppel as a clear error, finding that applying some restrictive test to the doctrine (as the Tenth Circuit did here) was nothing less than a rejection of the rule:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate

> fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit....
>
> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hyper-technical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine that record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.....

Ashe v. Swenson, 397 U.S. 436, 443-444 (1970)(footnotes omitted). A general verdict can also be used to preclude relitigation of an issue in a civil trial. Patrick v. South Central Bell Tel. Co., 641 F.2d 1192, 1198-1199 (6th Cir. 1980).

The Tenth Circuit's review of factual findings for collateral estoppel application "de novo" conflicts with other Federal Circuits as well. For example, in Raytech Corp. v. White, 54 F.3d 187 (3d Cir.1995), the trial court applied collateral estoppel to preclude a defendant from relitigating an issue. The Third Circuit held that under Parklane, "in reviewing the district court's decision to apply offensive collateral estoppel, we are bound by the abuse of discretion standard." Raytech at 190. Other Circuits have similarly held that an abuse of discretion, not de novo, standard applies to the fact-based determination that issues are the same under collateral estoppel. See Winters v. Diamond Shamrock Chemical Co., 149 F.3d 387, 391-92 (5th Cir. 1998); Berger Transfer & Storage v. Central States, Southeast and Southwest Areas Pension Fund, 85 F.3d 1374, 1376 (8th Cir. 1996); Bates v. Union Oil Co. of California, 944 F.2d 647, 651 (9th Cir. 1991); McLendon v. Continental Can Co., 908 F.2d 1171, 1177 (3d Cir. 1990).[3]

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[3] The issue addressed to this Court clearly fits well within the guidelines set by this Court for granting a writ of certiorari. Supreme Court Rule 10 directs that "[a] petition for a writ of certiorari will be granted only for compelling reasons", and sets forth some of the factors that the Court considers, including the following:

> a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter...or has so far departed from the accepted and usual course of judicial proceedings...as to call for an exercise of this Court's supervisory power;
>
> . . . .

Indeed, the Tenth Circuit itself paid lip service to the broad discretion given the trial judge in deciding whether to apply collateral estoppel under Parklane. The court states in a footnote:

> Assuredly, we are cognizant of the trial court's broad discretion and long involvement in the two cases. Neither, however, trumps the legal elements of the doctrine. Although the court and counsel may know how an issue was resolved, that understanding cannot be fully superimposed onto the second jury without a clear indication of what, in fact, the first jury decided.

> a United States court of appeals...has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Supreme Court Rule 10(a), (c).

The ruling here presents a clear case of conflicts between the Circuits, conflict with the relevant leading decision of this Court, and the need for supervisory review in the important area of managing dockets at the trial and appellate court level. The Tenth Circuit has enunciated a rule that makes moot much of the detailed and prudent management of the District Court as to its own case load, and if **permitted to stand,** vastly expands the work of the appellate courts to **reanalyze** factual details under a de novo standard. The ruling needs to be reviewed because it wrongly restricts what case management authority requires at the District Court level and wrongly expands what is to be done at the Circuit Court level.

App. A at 18a, n. 10.

Of course, it is exactly the trial court's understanding of how an issue was resolved that allows for the efficient management of complex, multiple plaintiff consolidated actions. A detailed undoing of the work of the District Judge because it is not "unassailable" and under a de novo standard, by those removed from the factual development, is the precise antithesis of the broad discretion committed to the court presiding over the trial of such facts. Thus, the head nod paid to discretion by the Tenth Circuit in its footnote is never reconciled and cannot be reconciled with its ruling supplanting the trial court's judgment on the factual issue with its own judgments after de novo review of the record.

The Tenth Circuit's review de novo to determine if the finding of the same issue was an "unassailable finding" is not deference to the trial court's discretion; rather, it places on the court below the burden of proving beyond doubt or "assailability" that the factual issues were the same. In no case is there authority for this rule and the Tenth Circuit cites none. The ruling is contrary to Parklane, eviscerates the "broad discretion" and "clearly erroneous" rule, and sets up a stark conflict between the circuits supervised by this Court, which will contribute to forum shopping in the filing of complex cases. It turns on its head the whole fabric of sound case management processes to which the doctrine of collateral estoppel contributes, and which depends upon a vesting of the exercise of sound judgment in the court dealing with the facts. The Tenth Circuit's rule also eliminates the benefits and efficiencies to the federal court system of the "abuse of discretion" standard. The appellate court may from time to time want to wade in as initial decision-maker (despite being a step removed from the factual record), but this duplication of effort does not serve the goal of reasonable management of

a very crowded and backlogged judiciary. (The cases in this consolidated group are over 10 years old, for example.)

Finally, the Tenth Circuit went further in its misconstruing of collateral estoppel to hold that there is an additional factor precluding its application, found in no case authority and again contrary to Parklane and to the holdings of other circuits. The court here held that the trial judge erred in not giving "notice" to Defendant that an issue litigated in the first trial would be precluded in the second trial against the same defendant. App. A at 21a, 24a. Under Parklane, and the other circuits, the fact that a defendant knows of pending cases satisfies any "fairness" standard, so long as it has a full opportunity to litigate the issue. Parklane at 332. The Tenth Circuit went even further in abrogating this fairness standard by holding that the defendant must "agree" that an issue once litigated will be precluded in another trial. App. A at 24a. The only case cited for this novel addition to collateral estoppel is In re TMI Litigation, 193 F.3d 613 (3d Cir. 1999). App. A at 23a-24a. TMI refused to apply collateral estoppel against non party plaintiffs. Id. at 725-726. Of course this entirely unremarkable proposition, for which TMI stands, is utterly irrelevant here since the same defendant was a party to the preceding lawsuit. The improper engrafting of this new "notice" and "agreement" requirement to the routine application of collateral estoppel also requires supervisory intervention by this Court to achieve Federal uniformity of approach.

CONCLUSION

The doctrine of collateral estoppel is important for efficient management of the modern judicial system, as this Court has recognized for some time. Parklane. As the system becomes more expensive for the parties and the taxpayers,

appellate courts must exercise restraint so that they do not appropriate the duties of the district court, even if they believe they would have done the job differently.

The Tenth Circuit improperly substituted its own view of the factual issue by conducting its review of the record (App. A at 7a-16a, 19a-23a) and reaching a different conclusion than the trial judge who presided over the cases for ten years, and for both trials. The court improperly rejected the "broad discretion" standard in the context of a determination by a respected District Judge who had presided over two extremely lengthy trials and years of pretrial. It replaced this standard with one of "de novo" review, requiring "unassailability" of the court's judgment below, thus creating a conflict among the circuits and with the authority of this Court, and adding a notice and consent requirement to the established doctrine.

Accordingly, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

/s/_____
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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed February 11, 2000]

Nos. 99-1178, 99-1199

JOSEPH DODGE, individually and	)
as personal representative of the	)
Estate of Thelma Dodge;	)
ROCKY MOUNTAIN EQUESTRIAN	)
CENTER, INC.; PATRICK SHANE	)
DODGE; CONNIE DODGE; NATHAN	)
DODGE, LESLIE DODGE, BRYAN	)
DODGE, and PATRICK DODGE,	)
minors, by and through their parents	)
and next friends, Patrick Shane Dodge	)
and Connie Dodge; YVONNE	)
PEGARARO; NOAH WELCH, and	)
JEREMIAH WELCH, minors, by and	)
through their parent and next friend	)
Yvonne Pegararo; RHONDA	)
BUTSON; DANIEL SLANOVICH;	)
GUS SLANOVICH; CHANDLER	)
CREEK COMPANIES; DONALD LUNA;	)
SONJA LUNA; BRETT LUNA;	)
JAMES BLUE, individually and as	)

personal representative of the Estate of)
Virginia Blue; EDNA BLUE;)
RUSSELL JEWETT; BONITA JEWETT;)
SHIRLEY BICKETT; JOHN BICKETT;)
RICHARD JANITELL; RALPH)
JANITELL; JOHN PINELL; EMMA)
PINELL; JAMES L. TREAT;)
ASPEN TRUST; NARD CLAAR;)
SARA CLAAR; RUTH QUICK)
JOHNSON; MIKE HADLEY;)
KATHERINE HADLEY; LINDA)
JOHNSON; ALICIA JOHNSON)
and BLAINE JOHNSON, minors by)
and through their mother and next)
friend Linda Johnson; JULIE ANN)
WRIGHT; JENNIFER WRIGHT and)
NICOLE WRIGHT, minors by and)
through their mother Julie Ann Wright,)
and CANON FARMS TRUST,)
Plaintiffs,)
)
DESIREE CHRYSLER; DANIEL)
CHRYSLER; AUGUST CHRYSLER,)
and CLAYTON CHRYSLER, minors, by)
and through their parents and next friends,)
Desiree Chrysler and Daniel Chrysler;)
NORMAN PLATT, individually and as)
personal representative of the Estate of)
Dorothy Platt; BRUCE HADLEY;)
VIRGINIA HADLEY; JACK HADLEY;)
SHAYLEE HADLEY; KIM MYERS;)
SID MYERS; CASEY MYERS and)
CHAD MYERS, minors by and through)

their parents and next friends Kim Myers and Sid Myers,
Plaintiffs - Appellees and Cross - Appellants,

vs.

COTTER CORPORATION,
Defendant - Appellant and Cross - Appellee.

Appeal from the United States District Court for the District of Colorado (D.C. No. 91-Z-1861)

Before BALDOCK, PORFILIO, and MURPHY, Circuit Judges

PORFILIO, Senior Circuit Judge.

OPINION

In 1958, Cotter Corporation, a subsidiary of the Commonwealth Edison Company of Illinois, began operating a uranium mill near Canon City, Colorado, extracting uranium from ore by an alkaline leach process. The two types of waste produced by that process, tailings, dust-like particles of ore, and raffinate, liquid recovered from the uranium extraction solutions, eventually contaminated the area, including the semi-rural community of Lincoln Park, and triggered its designation as a Superfund site on the EPA's National Priority List. Subsequently, some five hundred

Lincoln Park residents filed an action under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675, the Price-Anderson Act, 42 U.S.C. § 2210(n)(2), and Colorado law alleging Cotter's negligent operation of the mill caused damage to their health and property. After class certification was denied, eight plaintiffs, selected for the first trial, convinced a jury Cotter was negligent in operating the mill but failed to establish its negligence caused their exposure to hazardous materials which required future medical monitoring.

Now before us is a second group of fourteen plaintiffs who, armed with the first jury's finding of negligence, established Cotter's negligence caused their physical injuries and were awarded monetary damages. Cotter assails the judgment on numerous grounds, and plaintiffs cross-appeal. Of the many issues Cotter raised, one predominates. After careful review of this ponderous record, we conclude the district court incorrectly applied the doctrine of offensive collateral estoppel, precluding Cotter from litigating the issue of negligence. For the single issue remaining in plaintiffs' cross-appeal, whether the district court properly granted summary judgment dismissal of their fear of cancer claim, we reject the contention of error. We, therefore, reverse the judgment and remand the action for retrial.

I. Background

The Cotter uranium mill (the Mill) occupies a 640-acre site in south central Colorado, two and a half miles south of Canon City. Lincoln Park, an unincorporated area, is a mile and a half north of the Mill. The Arkansas River borders

Lincoln Park's northern rim while Sand Creek and the DeWeese Dye Ditch angle across its southern perimeters. During its years of operation crushing ore into "yellowcake," a concentrated uranium,[1] dry tailings were carried off-site by winds. Liquids, recovered from the uranium extraction solutions and stored in unlined ponds, leached into groundwater beneath the Mill and flowed north toward Lincoln Park along the Sand Creek channel.

As early as 1959, the Atomic Energy Commission (AEC), which then regulated uranium production operations at the Mill, notified Cotter of violations of the conditions of its license. Annual violations of AEC standards of Protection Against Radiation occurred through 1968 when the state of Colorado (the State) took over responsibility from the AEC for licensing radioactive materials. In the meantime, Cotter's production rose from 50 tons of uranium a day in 1958 to 1200 tons a day in 1979, when the State relicensed the Mill.

In an effort to clean up the site, both the EPA and the Colorado Department of Public Health and Environment (Department) targeted the Mill's unlined storage ponds as a primary source of the proliferation of such hazardous substances as uranium, molybdenum, thorium, radium, selenium, arsenic, and lead. By 1981, Cotter had closed eight unlined ponds and constructed two new tailings facilities sealed with an eighteen inch hypalon liner overlaid with six

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[1] The Mill produced and shipped the yellowcake to nuclear power plants in northern Illinois owned by Commonwealth Edison, Cotter's parent company.

inches of clay.[2] Later, Cotter added a clay barrier to the Sand Creek Dam to prevent water flow from the Mill into Lincoln Park. Despite these efforts, state inspections would reveal tears in the ponds' linings or violations of air emissions standards. Although Cotter ceased operating the Mill in 1987. the Department projected the clean-up would not be completed until 2012.[3]

In 1983, after persistent and unabated violations, the State sued Cotter in federal court for damages to natural resources and clean-up of the contamination. *State of Colorado v. Cotter Corp.*, Case. No. 83-C-2389. In 1988, the parties settled the matter by a Consent Decree which provided a Remedial Action Plan (Plan). The Plan required the creation of the Human Health Risk Assessment Panel (Panel) which prepared a report in 1991 on the Lincoln Park Superfund Site evaluating the health risks to the surrounding populations from the Mill's off-site chemical releases. The Panel quantified exposures to Mill-related chemicals in air, surface water, sediment, ground water, soil, and different types of locally raised food; measured the toxicity of the exposures; and assessed the possible health risks based on those evaluations. The Panel concluded "risks to humans were generally low, especially when judged in comparison to natural 'background' levels of mill-related metals in the environment." However, the Panel excepted from that conclusion a possible health concern in drinking ground water

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[2] These ponds, an integral part of the Mill operation and site, are vast; one covers 91 acres; the other 44 acres.

[3] Cotter planned to resume operations in 1999.

"because of the presence of molybdenum (and, to a lesser extent, uranium) in the water."

II. *Boughton* Trial

In 1989, some five hundred residents and property owners living in Lincoln Park, Brookside, a community east of the Mill, and Canon City (collectively, Lincoln Park) filed suit in federal court. In an amended complaint, Lincoln Park plaintiffs requested statutory relief under CERCLA and sought damages exceeding $350 million for Cotter's negligence, strict liability, nuisance, willful and wanton conduct, outrageous conduct, trespass, and absolute liability. In addition, plaintiffs requested damages and injunctive relief for medical monitoring. Although plaintiffs sought class certification, the district court held the action was not maintainable under Fed. R. Civ. P. 23(a) because individual issues predominated over common issues of law or fact. The parties then agreed to the selection of eight bellwether plaintiffs *(Boughton* plaintiffs) for the first trial.

The *Boughton* plaintiffs did not allege any physical illnesses or injuries. Instead, they claimed they and their property were exposed to hazardous substances from the Cotter Mill and sought damages for trespass to real estate; damages for nuisance; and medical monitoring based on negligence.

At the close of the evidence after a twenty-three day trial, the court framed the issues for the jury to decide with the parties' claims and defenses. It instructed the jury, in part, "The plaintiffs claim that they and their properties have been exposed to radioactive and hazardous contamination as a

result of Cotter's milling operation. They assert that this contamination has significantly increased their risk of health problems, and that they are therefore entitled to medical monitoring." Although the Boughton plaintiffs did not claim their exposure to hazardous substances caused physical injuries, they contended medical monitoring of the possible adverse effects of the exposures was required. For Cotter's theory of defense, the court told the jury,

> Cotter admits that its operations have caused some ground water contamination by radioactive and molybdenum materials in certain limited areas, but Cotter states that the contamination has been and is now being cleaned up pursuant to a government-supervised Remedial Action Plan. Cotter claims that it did not engage in any conduct nor breach any legal standard for which it would be liable to plaintiffs.

The court then instructed the jury on negligence tracking the language of the Colorado Civil Jury Instructions. Instruction 25 provided:

> The plaintiffs claim that Cotter was negligent, and therefore plaintiffs are entitled to medical monitoring.
>
> Negligence means a failure to do an act which a reasonably careful person or company would do, or the doing of an act which a reasonably careful person or company would not do, under the same or similar

> circumstances to protect others from bodily injury or property damage.
>
> Even if statutes, ordinances or regulations govern the actions of a person or corporation, that person or corporation must use reasonable care under the particular circumstances and conditions prevailing.
>
> Reasonable care is that degree of care which a reasonably careful person or company would use under the same or similar circumstances.
>
> The degree of care that constitutes reasonable care increases in proportion to the degree of risk associated with the particular activity.

Instruction 26 set forth each of the elements the jury had to find for the *Boughton* plaintiffs to succeed on the claim of negligence for medical monitoring. It stated:

In order for any particular plaintiff to recover from Cotter on his or her negligence claims for medical monitoring, you must find that all of the following have been proved as to that particular plaintiff:

1. that the particular plaintiff was significantly exposed to a proven hazardous substance:

2. that Cotter was negligent;

3. that Cotter's negligence was a cause of that plaintiff's exposure;

4. that as a result of that exposure, the particular plaintiff suffers a significantly increased risk of contracting a serious latent disease;

5. that the significantly increased risk makes periodic diagnostic medical examinations reasonably necessary; and

6. that monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.

The determination of which of the plaintiffs, if any, are entitled to medical monitoring must be made independently for each plaintiff.

If you find that a particular plaintiff has proved all six of these propositions by a preponderance of the evidence, then your verdict must be for that plaintiff on that plaintiff's negligence claim for medical monitoring.

After five days of deliberation, the jury returned separate special verdict forms[4] for each plaintiff making a

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[4] The special verdict form stated:

1. Was [plaintiff] significantly exposed to a proven hazardous substance? (Yes or No)
2. Was defendant Cotter negligent? (Yes or No)
3. Was Cotter's negligence, if any, a cause of

claim of negligence for medical monitoring, trespass, and nuisance. There was no separate verdict form on which the jury found Cotter was negligent under Instruction 25. However, on each of the plaintiffs' "Negligence claim for medical monitoring Special Verdict Form." the jury was asked whether Cotter was negligent and found Cotter negligent. For each *Boughton* plaintiff the jury also found there was no exposure to hazardous substances making reasonably necessary future medical monitoring or testing.[5] After the verdicts were read, the jury asked the court, "[C]ould you explain about the other 500 plaintiffs? We promise we never considered them during deliberation." The court told them because it was impossible to try such a large case, it was hoped that an initial bellwether trial might provide some "indication helpful" to resolve the remaining plaintiffs' cases. The *Boughton* plaintiffs' appeal of the denial

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[plaintiff's] exposure, if any? (Yes or No)

4. As a result of his exposure, if any, does [plaintiff] suffer a significantly increased risk of contracting a serious latent disease? (Yes or No)
5. Does this significantly increased risk, if any, make periodic diagnostic medical examinations reasonably necessary for [plaintiff]? (Yes or No)
6. Do monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial for [plaintiff]? (Yes or No)

[5] Three plaintiffs prevailed on nuisance claims; six succeeded on their claims of trespass although only four were awarded monetary damages. No non-economic or exemplary damages were awarded.

of class certification and other issues was later rejected. *Boughton v. Cotter Corp.*, 65 F.3d 823, 828 (10th Cir. 1995). Cotter did not cross appeal.

III. *Dodge* Trial

In the second trial, fourteen plaintiffs (collectively here, *Dodge),* members of four Lincoln Park families, filed an amended complaint which was virtually identical to the complaint in *Boughton I.* Although the years of the alleged negligence are slightly different,[6] the *Dodge* complaint alleged verbatim Cotter's negligence rested on its breach of the "duty to properly control and contain the radioactive and/or hazardous materials," and "to prevent said radioactive and/or hazardous materials and constituents from being released into the air and allowed to migrate or leak into the groundwater, surface water, rivers and soils in the vicinity." Further, the complaints alleged the breach of the duty to control and contain allowed "radioactive and/or hazardous materials to be released into the air and allowing said radioactive material and constituents to migrate or leak into the groundwater, surface water, rivers and soil in the vicinity." The complaint listed the same eleven "negligent acts and/or omissions" found in Boughton.[7]

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[6] *Boughton I* alleged 1958-present, and *Dodge* 1958 - 1991. Although the difference is readily explainable, the first verdict did not indicate the time period or dates of Cotter's negligence.

[7] Paragraph 50 of both complaints stated:

These releases and contamination of the air,

ground water, surface water, rivers and soil in the vicinity of the facility and property were proximately caused and their results aggravated by the negligent acts and/or omissions of the Defendants including, but not limited to, the following:

(A) permitting the emissions, releases and leaks of radioactive and/or hazardous materials from the facility and property to occur;

(B) failing to determine where and how the emissions, releases and leaks of radioactive and/or hazardous materials occurred and in failing to correct the problems to prevent further leakage and emissions;

(C) failing to provide adequate containment of the radioactive and/or hazardous materials;

(D) failing to provide adequate air, surface water, ground water, rivers and soil sampling and/or monitoring to detect releases of radioactive and/or hazardous materials;

(E) failing to take proper measurements of particle sizes and emissions;

(F) failing to test incoming ores adequately for the presence of hazardous or toxic materials;

(G) failing to timely and adequately warn or otherwise notify Plaintiffs of such releases and contamination and the effects thereof;

The *Dodge* plaintiffs moved prior to trial for partial summary judgment on the issues of negligence, trespass, and nuisance, contending those issues were settled in *Boughton,* and Cotter should be collaterally estopped from litigating them in the second trial. The *Dodge* plaintiffs represented the district court had "streamlined resolution of issues common to all Lincoln Park residents by designating eight Bellwhether [sic] plaintiffs in Boughton." They urged because the *Boughton* jury finally adjudicated "the ultimate issues of negligence, trespass and nuisance . . . [a]pplication of collateral estoppel to these issues is the logical follow-up to the Court's prior decisions, and accomplishes avoiding the unnecessary expense of multiple litigation of the same issues,

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> (H) failing to take timely and adequately remedial actions to contain and clean up such contamination and to prevent recurring releases;
>
> (I) failing to properly train and supervise their employees to insure that the necessary safeguards and procedures would be followed in the event that any emissions, releases or leaks of radioactive and/or hazardous materials from the facility and property might occur;
>
> (J) failing to comply with applicable Federal and State laws, regulations, licenses or orders;
>
> (K) being negligent in the construction and implementation of remedial measures for containing releases from the tailing ponds and operating facilities.

conserving judicial resources, and encouraging reliance on judicial action." The *Dodge* plaintiffs relied on *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979), contending they had satisfied the four conditions for the offensive use of collateral estoppel.

Cotter strenuously resisted the motion, arguing that despite the virtually identical complaints, the first verdict was not clear, fully obscuring which of the eleven asserted grounds of negligence was found; which standard of care was relied upon over the forty-year period of operation; and what period of time Cotter acted negligently toward each plaintiff. Key to its argument, it contended, was labeling the *Boughton* I verdict a "special verdict," when, in fact, it was a general verdict.

At the hearing on the motion,[8] *Dodge* plaintiffs argued that because collateral estoppel is an issue-specific doctrine, its offensive use would insulate only the issue of negligence, the breach of the duty of care, leaving questions of proximate cause, damages, and affirmative defenses for the parties to establish. Cotter countered instructing the jury that the court had already found it was negligent was overwhelmingly prejudicial in the face of the *Dodge* plaintiffs' claims for punitive damages. Instead, Cotter urged the district court to instruct the jury that judgment was entered in its favor against plaintiffs for dismissal of the negligence claim for medical monitoring, eliminating its need to introduce medical

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[8] The hearing addressed only the issue of negligence, the court having already denied the motion on the issues of trespass and nuisance.

monitoring or physical injury testimony. Cotter relied on *Pomeroy v. Waitkus,* 517 P.2d 396 (Colo. 1973), in which the Colorado Supreme Court held the application of collateral estoppel was not appropriate to prevent the same defendant in a second trial from litigating affirmative defenses not raised in the first trial.

After hearing the arguments, the court ruled the "pure issue of negligence" had been decided and would not be relitigated, emphasizing the ruling did not affect liability, proximate cause, the negligence of another party, or willful and wanton conduct, all of which "certainly is going to be litigated." At the close of five weeks of trial in *Dodge,* the court then instructed the jury,

> The Court already has determined that defendant was negligent. The Court's determination that the defendant was negligent must not influence you in determining any of the remaining issues in this case. As you will be instructed further at the end of this case, a finding of negligence is not a finding of liability. You must still determine whether defendant's negligence caused any of the injuries or damages alleged by plaintiffs, whether defendant's conduct constituted gross negligence, and other issues that will affect the liability, if any, of the defendant.

The jury returned verdicts in favor of plaintiffs and awarded damages for physical injuries and diminution of the value of their property on that same day of deliberations.

IV. Collateral Estoppel

Cotter persists in contending the court improperly afforded *Dodge* plaintiffs the benefit of a preclusive factual finding which overwhelmingly prejudiced its ability to defend the second action. Although Cotter overlays the primal question of its negligence with the issue of causation and damages[9] and ultimately urges we adopt a per se rule that application of collateral estoppel is inappropriate in negligence cases, we must agree that whatever the plaintiffs, trials, and verdict forms were labeled, it is not possible to know the compass of the *Boughton I* jury's finding of negligence. We therefore hold the district court erred in giving that particular issue preclusive effect.

We review the district court's entry of summary judgment barring claims under the doctrine of collateral estoppel de novo, construing the record in the light most favorable to the non-moving party and drawing all inferences in that party's favor. *Gonzales v. Hernandez,* 175 F.3d 1202, 1204 (10th Cir. 1999) (citation omitted); *Meredith v. Beech Aircraft Corp.,* 18 F.3d 890, 894 (10th Cir. 1994). We also

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[9] Cotter also confuses the analysis under Fed. R. Civ. P. 23 with that for determining whether the first trial resolved the question of negligence. The district court fully recognized collateral estoppel is an *issue* preclusion doctrine and did not confound it with questions of the various types of relief sought which formed the basis of the denial of class certification. Further, Cotter's assertion *Dodge* plaintiffs "could have opted to be plaintiffs in *Boughton"* is specious, defying the record of opposing counsels' meeting with the United States Magistrate Judge and selecting the plaintiffs for each case.

look to federal law to reach our conclusion. *Orjias v. Stevenson,* 31 F.3d 995, 1010 (10th Cir. 1994). That is, although the issue precluded, negligence, is a matter of state law, the preclusive effect given in federal court to a prior federal judgment is subject to federal law. *Murdock v. Ute Indian Tribe of Uintah & Ouray Reservation,* 975 F.2d 683, 687 (10th Cir. 1992).

"When an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson,* 397 U.S. 436, 443 (1970). *Parklane Hosiery* sanctioned the offensive use of collateral estoppel, permitting a plaintiff to "foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party." 439 U.S. at 326 n.4. Under *Parklane,* if the components of collateral estoppel are satisfied, its benefits of economizing judicial resources and lessening the burdens of relitigating identical issues already decided, would be afforded a non-mutual plaintiff provided defendant had previously had a full and fair opportunity to litigate the issue. Importantly, the decision to eliminate the mutuality requirement to permit the plaintiff such a windfall was placed within the trial court's "broad discretion." *Id.* at 331.[10]

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[10] Assuredly, we are cognizant of the trial court's broad discretion and long involvement in the two cases. Neither, however, trumps the legal elements of the doctrine. Although the court and counsel may know how an issue was resolved, that understanding cannot be fully superimposed onto the second jury without a clear indication of what, in fact, the first jury decided.

In this Circuit, application of collateral estoppel requires: (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. *Murdock,* 975 F.2d at 687 (citations omitted). The record copiously establishes three of the four elements. However, the *Boughton I jury* instructions, our blueprint for determining the parameters of the first jury's verdict, sabotage the existence of the first element.

As we previously noted, the *Boughton I* complaint contained eleven specific allegations of negligence, providing detail to the preceding three paragraphs alleging Cotter's duty, breach of the duty, and "negligent acts and/or omissions of the Defendants, including but not limited to" the catalog of specific negligent acts. Nonetheless, the first jury was simply instructed, in part, "negligence means a failure to do an act which a reasonably careful person or company would do. . . ." The jury was not instructed on the specific duty, allegedly breached. Nor did the verdict form specify what negligent act formed the basis of the general finding of negligence. Counsel for *Dodge* plaintiff would fill the gap by stating that seven of the eleven specific counts of negligence "explicitly refer to releases and the other 4 (E, F. I, and J) clearly encompass them." Thus, she urges the *Boughton* trial was about the release of contaminants and adds "on the special verdict forms, the jury found that Cotter was negligent in answering questions about medical monitoring." However, the *Boughton* trial did not resolve whether the same released

contaminants in whatever directions or forms or times amounted to negligent conduct as to each *Dodge* plaintiff with a clear indication the parties intended to be bound for all future proceedings by that finding.

Moreover, although seven of the eleven specific allegations may refer in some respect to releases, another alleges Cotter failed to test incoming ores; a second that Cotter failed to provide a timely and adequate warning; and a third that Cotter failed to properly train and supervise its employees. Nonetheless, our concern is not that the jury did not find negligence on one or more specific allegations, but that the general finding under the negligence instruction fails to identify what the jury found sustained by the evidence. Thus, we cannot say as a matter of law the issue decided by the first jury is identical to the issue in controversy in this case. To attempt to cure that detect by labeling the first trial a "bellwether,"[11] or citing the pretrial order is to no avail. The *Boughton* I jury's verdict does not assure an unassailable finding that plaintiffs met their burden of proof that Cotter breached a specific duty.

At oral argument, *Dodge* plaintiffs' counsel represented the *Boughton* trial court clearly indicated it would try the common issues for however many trials were necessary. In response to the panel's request for every citation to the record documenting the trial court's express intention to try the issue of negligence as if it were an exemplar or class action forum, *Dodge* counsel submitted a supplemental

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[11] The dictionary states a bellwether is "one that takes the lead." Webster's New International Dictionary (3d ed. 1993).

appendix including the *Boughton* complaint and jury instructions; pretrial orders indicating the presence of the issue of negligence; the special verdict forms; and a *Dodge* jury instruction. None of the citations expressly establishes the parties were on notice the first jury would decide the issue of negligence as a matter of law for all succeeding trials. For example, *Dodge* counsel prefaces inclusion of Boughton jury instruction 3, in part, to establish "the 8 Cases Were Bellwether Cases or Sample Cases Because It Would be Impractical to Try the 500 *Boughton* cases Separately." However, the jury instruction stated, after listing the names of the parties:

> In actuality, more than 500 plaintiffs have filed this action. Because it would not be practical to conduct more than 500 separate trials, or even one trial involving more than 500 plaintiffs, the parties and the Court decided to designate certain plaintiffs as sample plaintiffs, or "bellwether plaintiffs," and to *limit* this trial to their claims. . . . You should make no inferences from the Court's selection, and you are not to speculate or consider the extent to which these plaintiffs' claims *may or may not represent those of the remaining plaintiffs, since those claims are not before you.*

(italics added). Thus, there is no indication in the record before us that the parties understood the first trial would decide specific issues to bind subsequent trials.

In contrast, we would note Instruction 14 on trespass in Boughton I, an issue the district court did not collaterally

estop from retrial. That instruction read:

> For a plaintiff to recover on a claim of trespass, each of the following elements must be present:
>
> 1. that plaintiff holds title or a possessory interest in the property at the time of the alleged trespass;
>
> 2. the defendant sets in motion a force which, in the usual course of events, will damage that plaintiff's property; and
>
> 3. any entry upon, under or above the surface of that plaintiffs real estate without permission or invitation.
>
> If you find that a particular plaintiff has failed to prove any of these propositions by a preponderance of the evidence, then your verdict must be for Cotter on that plaintiffs trespass claim.
>
> On the other hand, if you find that a particular plaintiff has proved all three of these propositions by a preponderance of the evidence, then your verdict must be for that plaintiff on that plaintiff's trespass claim.

The instruction told the jury it must find each element on a claim of trespass by a preponderance of the evidence, a standard of proof explained in Instruction 4. Despite the

greater specificity of the instruction, the trial court refused to allow those findings to collaterally estop Cotter from proving trespass in *Dodge*. Counsel, however, further argues because the *Boughton I* jury found "in favor of each Plaintiff on their claims for trespass, so clearly the Boughton jury found that Cotter had released contaminants into the Lincoln Park area." However, we cannot transpose a general finding that substances were released under another theory of recovery to bar Cotter from contesting the range of its conduct and duties as alleged in a second action to determine its liability.

To place our concerns in a larger context, we would note *In re TMI Litigation*, 193 F.3d 613 (3d Cir. 1999), which involved the personal injury claims of over 2,000 area residents arising out of the 1979 nuclear reactor accident at Three Mile Island. In that case, the district court adopted a plan for a "mini-trial" suggested by plaintiffs. The plan called for an "initial mini-trial of the claims of twelve 'typical' plaintiffs, half chosen by plaintiffs and half chosen by defendants." *Id.* at 627. The mini-trial would focus on plaintiffs' "ability to demonstrate that they were exposed to doses of radiation sufficient to cause their neoplasms." *Id.* at 623. The parties then clearly agreed to proceed on an "All Plaintiffs" basis, extending the results of the mini-trial to bind nonparticipants. "A contrary intention or result would obviate all benefits of having consolidated the many separate actions," the district court stated. *Id.* at 628.

To establish causation, plaintiffs relied on several experts who testified about the dose of radiation released into the environment and then correlated the dose to plaintiffs' injuries. When the district court excluded the dose exposure testimony under *Daubert*, it then held its *Daubert* ruling

would bind all of the other non-trial plaintiffs. Analyzing this ruling under Fed. R. Civ. P. 42(b), the basis for consolidating all of the cases, the Third Circuit found applying the summary judgment ruling from the trial plaintiffs to the non-trial plaintiffs implicated substantive rights protected by the Seventh Amendment and improperly extended the doctrine of collateral estoppel/issue preclusion. *Id.* at 725-26. Despite the array of arguments for efficiency and streamlining the trial process in the face of a single nuclear accident, the Third Circuit reversed the extension of summary judgment applied to non-trial plaintiffs.

TMI must remind us to focus on what was actually litigated and who should be bound and benefit from those results. That concern must override arguments about inconsistent results and time-consuming relitigation of the same issue. If the parties intended to bind subsequent litigation with the results of prior test trials, the record must clearly memorialize that agreement. Their failure to do that here leaves important substantive rights at the mercy of trial tactics.

We therefore reverse the district court's grant of partial summary judgment, fully mindful of the impact of the conclusion on this already protracted and voluminous case. If *Boughton I* was to have been the test case in plaintiffs' effort to establish this toxic tort, greater care to assure the jury was properly instructed and the verdict forms were clear was essential to establish results impervious to relitigation.[12]

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[12] Obviously, this conclusion moots the remaining issues raised in the cross-appeals. However, because the question of

V. Fear of Cancer- 99-1199

The district court granted Cotter's motion for summary judgment on *Dodge* plaintiffs' claim for damages for emotional distress caused by their increased fear of cancer. In their cross-appeal, *Dodge* plaintiffs contend the ruling was error. Because the ruling represents a final judgment appropriate for review under 28 U.S.C. § 1291, it, unlike the other issues mooted by our disposition, remains viable. We review the district court's order granting summary judgment de novo, applying the same standard of Fed. R. Civ. P. 56(c) as did the district court. *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1235 (10th Cir. 1997). In this process, we draw all inferences in the non-movant's favor and analyze Colorado law afresh. *Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 496 (10th Cir. 1992).

To survive summary dismissal of this claim, *Dodge* plaintiffs argued their exposures to hazardous materials caused a range of physical conditions: bony growths. cataracts,

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expert testimony is likely to recur, we would be remiss not to indicate our concern that the district court vigilantly make detailed findings to fulfill the gatekeeper role crafted in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Given the novelty of the medical causation theory here linking exposure to molybdenum with osteoarthritis and bony exostoses, it is essential that by specific findings of record the trial court assures the expert testimony offered by both sides is relevant and reliable, and the "particular opinion is based on valid reasoning and reliable methodology." *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 806 (3d Cir. 1997). Finally, all outstanding motions are denied as moot.

headaches and irritability, to name a few. They contended these physical injuries met a threshold for recovery under *Towns v. Anderson,* 579 P.2d 1163, 1164-65 (Colo. 1978), which abolished the physical impact requirement in negligence cases for emotional distress and permitted a plaintiff who is subjected to an unreasonable risk of bodily harm because of another's negligence to recover upon proof of "the internal operation of fright or other emotional disturbance." *Id.* at 1164, quoting Restatement (Second) of Torts § 436(2). Having met this requirement with the evidence of an array of manifestations of physical injuries, *Dodge* plaintiffs, relying on *Boryla v. Pash,* 960 P.2d 123 (Colo. 1998), then contended Colorado law recognized their right to recover damages for their resulting objective fear of developing cancer.

The district court rejected the argument, observing *Dodge* plaintiffs offered no evidence of an objectively reasonable chronic, continuing physical manifestation to support their fear of an increased risk of cancer as required by *Towns* and *Boryla.*[13] *Dodge* plaintiffs now argue the court misapplied Colorado's "'physical impact' rule, which gives inference to the genuineness of Plaintiffs' fears so as to permit the jury to consider damages." We disagree.

In *Boryla,* plaintiff sought non-economic damages for emotional distress including the fear of an increased risk of

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[13] At the continued hearing on the motion on July 16, 1998, the court stated, "I doubt if we're going to have any claims for fear of cancer. I just don't see that we have sufficient material or sufficient showing for that."

the recurrence of her cancer as a consequence of her physician's failure to promptly diagnose her breast cancer. 960 P.2d at 123. Reversing the Court of Appeals' granting defendant a new trial, the Colorado Supreme Court rested its discussion on what it believed was a clear distinction between fear of cancer cases arising from a medical malpractice setting and those involving toxic torts.[14] It stated, "In cases where the plaintiff demonstrates that her cancerous condition physically worsened as a result of the delayed diagnosis, the plaintiff has demonstrated a sufficient physical injury to permit the recovery of emotional distress damages." *Id.* at 128. In contrast, the court noted a toxic tort case required a different standard because "the plaintiff has yet to experience the onset of cancer," *id.*, but believes the particular exposure makes him vulnerable to that increased risk.[15]

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[14] The court cited the discussion in *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993), which recognized significant policy concerns about the "staggering" impact of "an unrestricted plaintiff class" with fears of cancer. In those cases, the California court held, the jury may consider whether "it is more likely than not that the plaintiff will develop the cancer in the future due to the toxic exposure," as a threshold for recovery. *Id.* at 816.

[15] Defendant physician relied on *Potter,* which set forth a higher standard for recovery for fear of cancer damages in toxic tort cases, requiring "in the absence of a present physical injury or illness, damages for fear of cancer may be recovered only if the plaintiff pleads and proves that (1) as a result of the defendant's negligent breach of a duty owed to the plaintiff, the plaintiff is exposed to a toxic substance which threatens cancer; and (2) the plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the

The Colorado Supreme Court concluded, "For these reasons, traditional negligence principles which focus on proximate cause as well as the reasonableness of the plaintiff's fear are sufficient to evaluate fear of cancer claims in medical malpractice claims." Thus, *Boryla* was a medical malpractice case, and the court expressly limited its analysis and holding to that arena. *Id.*

Dodge plaintiffs, however, would extend the analysis to embrace their toxic tort claim, equating the manifestation of certain acute conditions with a permanent objective injury leading to an increased risk of cancer. In the absence of any indication the Colorado Supreme Court would permit such an expansion, we decline to do so. Nor is it necessary here. At a minimum, *Dodge* plaintiffs failed to set forth any evidence that they suffer from a chronic objective condition caused by their increased risk of developing cancer to permit their recovery for emotional distress damages. Although counsel would sweep every physical manifestation plaintiffs alleged under this mantle to satisfy *Boryla,* its efforts are misplaced. Summary judgment was therefore appropriate on the claim.

We therefore REVERSE and REMAND the case for a new trial. However, we AFFIRM the order granting summary judgment on the fear of cancer claim.

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plaintiff will develop the cancer in the future due to the toxic exposure." *Id.* at 816. Defendant sought to import this "more likely than not" standard into his medical malpractice case.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Filed March 11, 1999]

No. 91-Z-1861

NORMAN PLATT, individually and as personal representative of the Estate of DOROTHY PLATT: BRUCE HADLEY; VIRGINIA HADLEY; JACK HADLEY; SHAYLEE HADLEY; SID MYERS; KIM HADLEY MYERS; CASEY MYERS; CHAD MYERS; DANIEL CHRYSLER; DESIREE DODGE CHRYSLER; CLAYTON CHRYSLER; and AUGUST CHRYSLER,	)
Plaintiffs,	)
vs.	)
THE COTTER CORPORATION, and COMMONWEALTH EDISON COMPANY.	)
Defendants.	)

AMENDED JUDGMENT

This matter was tried, as to the above plaintiffs only, on June 15, 1998, through June 24, 1998, and continued on June 29, 1998, through July 2, 1998, and continued on July 6, 1998, through July 15, 1998, before a jury of eight duly sworn to try the issues herein, the Honorable Zita L. Weinshienk, Judge, presiding. The trial proceeded to conclusion and the jury rendered its Special Verdict Forms as follows:

1. That the negligence of defendant Cotter Corporation (Cotter), which had already been determined by the Court, caused injuries, damages, and losses to plaintiffs Norman Platt, whose claims include claims for the death of Dorothy Platt, Bruce Hadley, Virginia Hadley, Jack Hadley, Shaylee Hadley, Sid Myers, Kim Hadley Myers, Casey Myers, Chad Myers, Daniel Chrysler, and Desiree Dodge Chrysler.

2. That neither the New Jersey Zinc Smelter, nor the Western Energy Power Company were negligent or at fault.

3. That neither the New Jersey Zinc Smelter, nor the Western Energy Power Company caused the plaintiffs' claimed injuries.

4. That no damages were incurred by the plaintiffs for non-economic losses or injuries, excluding any damages for physical impairment or disfigurement.

5. That plaintiff Norman Platt is entitled to damages for economic losses, excluding any damages for physical impairment or disfigurement in the amount of $24,100.00.

6. That the total amount of damages incurred by the plaintiffs for physical impairment or disfigurement are as follows:

Norman Platt	$75,900.00
Bruce Hadley	23,000.00
Virginia Hadley	40,008.00
	(physical impairment only)
Jack Hadley	203,800.00
Kim Hadley Myers	145,600.00
Casey Myers	254,300.00
	(physical impairment only)
Chad Myers	249,300.00
	(physical impairment only)
Daniel Chrysler	100,000.00
Desiree Dodge Chrysler	167,300.00

7. That defendant Cotter was 100% negligent and said negligence was a cause of plaintiffs' injuries, damages, and losses.

8. In favor of plaintiffs on their claims for medical monitoring.

9. That defendant Cotter trespassed on the property of plaintiffs Norman Platt, Bruce Hadley, Virginia Hadley, Jack Hadley, Shaylee Hadley, Sid Myers, and Kim Hadley

Myers and awarded damages for said trespass as follows:

Norman Platt	$49,000.00
Bruce Hadley	38,500.00
Virginia Hadley	38,500.00
Jack Hadley	3,850.00
Shaylee Hadley	3,850.00
Sid Myers	21,700.00
Kim Hadley Myers	21,700.00

10. That beyond a reasonable doubt the injuries caused by Cotter were attended by circumstances of fraud, malice, or willful and wanton conduct, and awarded punitive damages for its conduct as follows:

Norman Platt	$149,000.00
Bruce Hadley	61,500.00
Virginia Hadley	78,508.00
Jack Hadley	207,650.00
Shaylee Hadley	3,850.00
Sid Myers	21,700.00
Kim Hadley Myers	167,300.00
Casey Myers	254,300.00
Chad Myers	249,300.00
Daniel Chrysler	100,000.00
Desiree Dodge Chrysler	167,300.00

The Court determines that there is no just reason for delay, and expressly directs that judgment enter pursuant to Fed. R.Civ. P. 54(b). It is therefore,

ORDERED that judgment is entered in favor of: Norman Platt in the amount of $298,000.00; Bruce Hadley in the amount of $123,000.00; Virginia Hadley in the amount of $157,016.00; Jack Hadley in the amount of $415,300.00; Shaylee Hadley in the amount of $7,700.00; Sid Myers in the amount of $43,400.00; Kim Hadley Myers in the amount of $334,600.00; Casey Myers in the amount of $508,600.00; Chad Myers in the amount of $498,600.00; Daniel Chrysler in the amount of $200,000.00; and Desiree Dodge Chrysler in the amount of $334,600.00 and against defendant Cotter as to all plaintiffs. It is

FURTHER ORDERED that a judgment requiring medical monitoring in favor of all plaintiffs and against defendant Cotter is entered in **the amount of $301,939 to be placed in a trust or an escrow account. It is**

FURTHER ORDERED that a judgment covering pre-judgment interest shall enter in favor of: Norman Platt in the amount of $194,272.00; Bruce Hadley in the amount of $85,937.00; Virginia Hadley in the amount of $112,122.00; Jack Hadley in the amount of $316,099.00; Shaylee Hadley in the amount of $2,328.00; Sid Myers in the amount of $28,478.00; Kim Myers in the amount of $252,644.00; Casey Myers in the amount of $173,778.00; Chad Myers in the amount of $170,362.00; Daniel Chrysler in the amount of $111,194.00; Desire Chrysler in the amount of $186,028.00 and against defendant Cotter as to all plaintiffs. It is

FURTHER ORDERED that plaintiffs shall have their costs totalling $11,001.00, to be divided among plaintiffs. It is

FURTHER ORDERED that post-judgment interest shall accrue at the legal rate of 5.413% per annum. It is

FURTHER ORDERED that a stay of execution will enter on condition that a bond is posted by defendant in the amount of $5,301,507, within thirty days.

DATED at Denver, Colorado, this *11* day of March, 1998.

BY THE COURT:

/s/_____
ZITA L. WEINSHIENK,
Senior Judge
United States District Court

APPENDIX C

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed March 22, 2000]

Nos. 99-1178, 99-1199

JOSEPH DODGE, individually and as personal representative of the Estate of Thelma Dodge; ROCKY MOUNTAIN EQUESTRIAN CENTER, INC.; DESIREE CHRYSLER; DANIEL CHRYSLER; AUGUST CHRYSLER, AND CLAYTON CHRYSLER, minors, by and through their parents and next friends, Desiree Chrysler and Daniel Chrysler; PATRICK SHANE DODGE; CONNIE DODGE; NATHAN DODGE, LESLIE DODGE, BRYAN DODGE, and PATRICK DODGE, minors, by and through their parents and next friends, Patrick Shane Dodge and Connie Dodge; YVONNE PEGARARO; NOAH WELCH, and JEREMIAH WELCH, minors, by and through their parent and next friend Yvonne Pegararo; RHONDA	)

BUTSON; DANIEL SLANOVICH; GUS)
SLANOVICH; CHANDLER CREEK)
COMPANIES; DONALD LUNA;)
SONJA LUNA; BRETT LUNA; JAMES)
BLUE, individually and as personal)
representative of the Estate of Virginia)
Blue; EDNA BLUE; NORMAN PLATT,)
individually and as personal)
representative of the Estate of Virginia)
Blue; EDNA BLUE; NORMAN PLATT,)
individually and as personal)
representative of the Estate of Dorothy)
Platt; RUSSELL JEWETT; BONITA)
JEWETT; SHIRLEY BICKETT; JOHN)
BICKETT; RICHARD JANITELL;)
RALPH JANITELL; JOHN PINELL;)
EMMA PINELL; JAMES L. TREAT;)
ASPEN TRUST; NARD CLAAR; SARA)
CLAAR; RUTH QUICK JOHNSON;)
BRUCE HADLEY; VIRGINIA)
HADLEY; MIKE HADLEY;)
KATHERINE HADLEY; JACK)
HADLEY; SHAYLEE HADLEY;)
KIM MYERS; SID MYERS; CASEY)
MYERS and CHAD MYERS, minors by)
and through their parents and next friends)
Kim Myers and Sid Myers; LINDA)
JOHNSON; ALICIA JOHNSON and)
BLAINE JOHNSON, minors by and)
through their mother and next friend)
Linda Johnson; JULIE ANN)
WRIGHT; JENNIFER WRIGHT and)
NICOLE WRIGHT, minors by and)

through their mother Julie Ann Wright, and CANON FARMS TRUST, *Plaintiffs - Appellees*,	)
vs.	)
COTTER CORPORATION, *Defendant - Appellant*.	)

ORDER

Filed March 22, 2000

Before PORFILIO, BALDOCK, and MURPHY, Circuit Judges.

Appellant's, as well as the Appellees' petition for rehearing are denied.

The petitions for rehearing en banc were transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the petitions are also denied.

Entered for the Court
PATRICK FISHER
Clerk of Court

/s/_____
Deputy Clerk